

STATE OF MICHIGAN
COURT OF APPEALS

BOB TURNER, INC.,

Plaintiff-Appellant,

v

CRESTVIEW CLARKSTON, L.L.C., a/k/a
CRESTVIEW AVE CLARKSTON, L.L.C.,
WINTER HOWELL DEVELOPMENT, L.L.C.,
TERRY J. WINTER, and NORTH OAKLAND
COMMUNITY BANK,

Defendants-Appellees.

UNPUBLISHED
September 26, 2006

No. 262144
Oakland Circuit Court
LC No. 2004-062504-CK

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order denying its motion to reinstate this case, which had been dismissed. We vacate the trial court's order and remand for further proceedings.

Plaintiff filed this action in November 2004. On February 5, 2004, the trial court issued an order to show cause why defendants had not been defaulted. Plaintiff attempted to comply with the order by submitting an application for default before the hearing date and thus did not appear for the show cause hearing.¹ The day after the hearing, plaintiff received notice from the clerk's office that the default application could not be accepted due to improper service on one of the parties. Before plaintiff could make proper service and resubmit the application, the trial court made a docket entry of dismissal. Consequently, the clerk's office rejected the resubmitted default application. The trial court denied plaintiff's motion to reinstate the case.

Plaintiff challenges the trial court's authority to enter the order to show cause. Assuming without deciding that the court lacked such authority, plaintiff is still not excused from complying with the order. *Schumacher v Tidswell*, 138 Mich App 708, 722; 360 NW2d 915 (1984); *ARA Chuckwagon of Detroit, Inc v Lobert*, 69 Mich App 151, 161; 244 NW2d 393 (1976).

¹ There is no record of the case being called on the date specified for the show cause hearing.

However, to the extent that the trial court had authority to dismiss the case sua sponte for plaintiff's technical failure to comply with the show cause order, we find that it abused its discretion.

Dismissal for violation of a court order "is a drastic step that should be taken cautiously." *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506; 536 NW2d 280 (1995). "Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Brenner v Kolk*, 226 Mich App 149, 163; 573 NW2d 65 (1997). Factors to be considered in determining whether dismissal is an appropriate sanction include: (1) whether the violation was willful or accidental; (2) the degree of compliance with other parts of the order; (3) attempts to cure the defect; (4) whether the party has history of refusing to comply with other court orders; (5) whether the party has a history of deliberately delaying the proceedings; (6) whether the opposing party has been prejudiced; and (7) whether a lesser sanction would better serve the interests of justice. *Vicencio, supra* at 507; *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 360; 503 NW2d 915 (1993).

It appears that the trial court intended to dismiss the case for plaintiff's failure to comply with the show cause order, although it inexplicably delayed a week in decreeing dismissal and even then failed to enter an actual order of dismissal. There is no indication in the record that the court considered options short of dismissal, and the court never explained why the circumstances justified the harsh sanction of dismissal. Because the court apparently failed to consider lesser sanctions and did not evaluate its options on the record, we vacate the trial court's order and remand for a determination of an appropriate sanction upon consideration of the appropriate factors. *Adams v Perry Furniture Co (On Remand)*, 198 Mich App 1, 17-18; 497 NW2d 514 (1993), overruled in part on other grounds *Allied Electric Supply Co, Inc v Tenaglia*, 461 Mich 285, 289; 602 NW2d 572 (1999).

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper